

1
2
3
4
5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

7 BRET C. KIFER and JENNIFER A.
8 KIFER,

9 Plaintiffs,

10 v.

11 AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

12 Defendant.

CASE NO. 13-6085 RJB

ORDER ON DEFENDANT'S
MOTIONS FOR PROTECTIVE
ORDER AND TO COMPEL AND
PLAINTIFFS' MOTION TO
COMPEL

13
14 This matter comes before the Court on Defendant American Family Mutual Insurance
15 Company's ("American Family") Motion for Protective Order (Dkt. 63), Plaintiffs' Motion to
16 Compel Production of Documents from Defendant (Dkt. 67), Defendant's Motion to Compel
17 IRS Records and Tax Returns (Dkt. 65), and Defendant's Motion to Strike (Dkt. 80). The Court
18 has considered the pleadings filed in support of and in opposition to the motions and the file
19 herein.

20 This case arises from an insurance coverage dispute following a November 3, 2012 fire at
21 Plaintiffs' personal residence. Dkt. 1. At the time of the fire, Plaintiffs had an insurance policy
22 with Defendant, policy number 46-BD7584-01. Dkt. 18-1. Plaintiffs make claims for breach of
23 contract, for violations of the duties of good faith and fair dealing found in the Washington
24 Administrative Code ("WAC") 284-30-330 pursuant to the Insurance Fair Conduct Act, RCW

1 48.30.010, *et seq.* (“IFCA”), and for violations of Washington’s Consumer Protection Act
 2 (“CPA”) RCW 19.86, *et seq.* Dkt. 72.

3 Parties here certify that they have conferred and attempted to resolve these discovery
 4 disputes, pursuant to Rule 37(a)(1), to no avail. These motions followed.

5 Defendant moves for the issuance of an order protecting it from having to produce
 6 documents asserted to be created in anticipation of litigation and that are protected by attorney-
 7 client privilege and the work product doctrine. Dkt. 63. Defendant also moves for a protective
 8 order from having to produce irrelevant advertising materials. Dkt. 63. Plaintiffs did not directly
 9 respond to the motion for protective order, but, instead filed their Motion to Compel (Dkt. 67)
 10 seeking an order compelling these purportedly protected documents and the advertising
 11 materials. These two motions should be considered together. Defendant opposes the Plaintiffs’
 12 motion to compel. Dkt. 75. Parties certify that they have conferred on these discovery issues.
 13 The motions should be granted, in part, and denied, in part.

14 Defendant also moves the Court for an order compelling Plaintiffs to execute a
 15 stipulation and release to allow Defendant to obtain Plaintiffs’ IRS records and tax returns from
 16 2011 to present from the IRS. Dkt. 65. (The Plaintiffs’ personal copies were purportedly
 17 destroyed in the fire. *Id.*) Plaintiffs have responded and oppose the motion. Dkt. 77. The
 18 information sought is relevant, so, Defendant’s motion (Dkt. 65) should be granted.

19 **RELEVANT BACKGROUND FACTS**

20 The following facts are taken from the February 10, 2015 Order on Defendant’s Motion
 21 for Partial Summary Judgment and Plaintiff’s Motion for Leave to Amend Complaint (Dkt. 62,
 22 at 2-5):

23 The fire was caused by a malfunctioning heater/fan in a bathroom. Dkt.
 24 18-2. On November 21, 2012, the fire was determined to be accidental. Dkt. 18-

1 2. Plaintiffs submitted claims to Defendant for the loss, and Defendant accepted
2 coverage. *Id.* Defendant paid Plaintiffs \$3,000 on November 8, 2012 as an
advance on their personal property. Dkt. 21.

3 On February 21, 2013, Plaintiffs' repair estimate was completed by Har-
4 Bro West. Dkt. 52-4. Har-Bro West estimated that the replacement cost value
5 ("RCV") of the structure was \$413,474.56. *Id.*, at 51.

6 On March 29, 2013, Defendant sent Plaintiffs an estimate of damages for
the structure by its contractor, Belfor Property Restoration. Dkt. 52-1. The actual
7 cash value ("ACV")(cost of replacement less depreciation) was estimated to be
8 \$123,534.15. *Id.*, at 1. The RCV of the structure was estimated to be
9 \$267,871.94. *Id.*, at 1. In that estimate, Plaintiffs were informed:

If you wish to make a claim for the recoverable depreciation amount, you
must do TWO things:

1. You must have the item(s) replaced or repaired within one year from
your date of loss. *Exception: Georgia and Washington policies ONLY -
Please refer to your policy language as well as the section of this estimate
titled Claiming Recoverable Depreciation following the Estimate Recap or
Coverage Limit Details sections.

2. You must submit a final repair bill or purchase receipt showing the
item(s) has been repaired or replaced.

The attached estimate is what we expect to be the reasonable cost to repair
or replace the property. This estimate may not include permit fees. If total
charges for repair/replacement plus permits exceed the amount shown here
for that repair/replacement, prior to any deductible, then additional
amounts may be payable. If the actual cost is more or less, the final
payment will be adjusted accordingly.

14 Dkt. 52-1, at 1.

15 On May 7, 2013, Defendant's contractor, Belfor's, estimate regarding
16 repair of the structure increased: the ACV was estimated to be \$147,241.16 and
the RCV of the structure was estimated to be \$321,446.87. Dkt. 52-7, at 1.

17 On May 28, 2013, Defendant paid Plaintiffs \$122,534.15 (\$123,534.15
less the \$1,000 deductible) on Plaintiffs' structure claim in accord with the March
29, 2013 estimate. Dkt. 22-2.

18 Prior to the fire, Plaintiffs were having difficulty paying their mortgage,
were "\$100,000 underwater," and were trying to negotiate a loan modification
19 with their bank. Dkt. 60-1, at 7. Plaintiffs state that they had difficulty trying to
decide whether to fix the home. Dkt. 60-1, at 8.

20 In June of 2013, Plaintiffs sent Defendant their content inventory. Dkt.
52-15. The ACV for contents was estimated to be \$542,164.95 and the RCV of
21 the contents was estimated to be \$651,879.31. *Id.*, at 2.

22 On August 6, 2013, Belfor, issued a new estimate for repairs to the
structure for \$394,588.33 RCV. Dkt. 52-9, at 1.

23 Plaintiffs demanded an appraisal in accord with the policy provisions on
August 30, 2013. Dkt. 52-10.

1 On November 1, 2013, Plaintiffs filed this case in Clark County
 2 Washington Superior Court. Dkt. 1. Plaintiffs' Complaint alleged that
 3 Defendant: 1) breached their contract in failing to pay for the loss of both the
 4 structure and contents of the structure and 2) breached the covenant good faith
 and fair dealing pursuant to the IFCA, RCW 48.30.010, *et seq.*, and the WAC
 284-30-330. *Id.* Plaintiffs seek damages, including treble damages, attorney's
 fees and costs. *Id.*

5 The case was removed to this Court, based on diversity jurisdiction, on
 6 December 24, 2013. Dkt. 1.

7 In accord with the policy's provisions and Plaintiff's demand, the
 8 appraisal on the structure claims (including landscaping) was conducted and an
 9 appraisal award was issued on December 15, 2013. Dkt. 18-3. The appraisal
 10 award on the structure and landscaping was for \$386,673.07 ACV and
 11 \$419,515.19 RCV. Dkt. 18-3.

12 Enservio, the company hired by Defendant to conduct a valuation on the
 13 contents of the house, issued their estimate on January 7, 2014. Dkt. 52-17. It
 14 estimated the contents at: \$241,733.59 ACV and \$526,882.33 RCV. *Id.*, at 616.

15 On January 11, 2014, Defendant paid \$296,981.04 for the structure (this is
 16 the appraisal award of \$419,515.19 minus the amount previously paid by
 17 American Family of \$122,534.15 on or about 5/28/2013). Dkt. 22-2. At this
 18 point, Plaintiffs had not repaired the structure.

19 That same day, Defendant sent Plaintiffs a check in the amount of
 20 \$237,008.59 for contents (ACV from the Enservio estimate minus \$1,000
 21 deductible and minus the amount previously paid by Defendant of \$3,000). Dkt.
 22 22-2. This check was rejected by Plaintiffs (Dkt. 22-3), reissued, and then later
 23 cashed (Dkt. 33-2).

24 On April 7, 2014, this Court granted Defendant's Motion to Confirm
 Appraisal Award Regarding the Structure Claims. Dkt. 20.

Parties were unable to come to an agreement about the value of the loss
 for the contents of the house. On April 28, 2014, this Court granted Defendant's
 motion to compel the parties to engage in the appraisal process for the Plaintiffs'
 contents claim. Dkt. 25.

On August 8, 2014, an appraisal award was issued on the value of the
 contents. Dkt. 33-1, at 1. The parties agreed that "the appraisal award is
 conclusive as to the amount of the contents loss, exclusive of any applicable limits
 pursuant to the policy, to which the Plaintiffs are entitled to recover." Dkt. 28, at
 3. On August 21, 2014, Defendant paid the remaining amount due in accord with
 the appraisal award on the contents claims. Dkt. 33-2. On November 4, 2014, the
 appraisal award regarding the contents claims was confirmed by order of this
 Court. Dkts. 35 and 36.

Defendant has now paid \$419,515.19 for the structure and \$328,095.27 for
 the contents. Dkt. 38. As of December 2014, it has paid \$99,983.57 in "ALE"
 benefits (for the fair rental value of the premises if uninhabitable) under the
 policy. Dkts. 38-1 and 46-1. It paid the ALE benefits in full, and terminated
 those benefits on January 11, 2015. *Id.*

On December 1, 2014, Defendant's motion to summarily dismiss Plaintiffs' claim for attorneys' fees, pursuant to *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wash.2d 37 (1991), was granted and the claim dismissed. Dkt. 41. This Court held that "[t]he dispute in this case was not over coverage" and that Defendant "accepted coverage." *Id.*, at 4. Plaintiffs did not oppose the motion.

On February 10, 2015, Defendant's motion for a ruling that Plaintiffs' claims based on the WAC violations pursuant to the IFCA be dismissed because there has been no denial of coverage was denied and Plaintiffs' motion for leave to amend their complaint to add a claim for violation of the Washington State Consumer Protection Act, RCW 61.24.127(a)(b) was granted. Dkt. 62. Plaintiffs filed their First Amended Complaint on February 18, 2015. Dkt. 72.

The discovery deadline was March 8, 2015, the dispositive motions deadline is April 7, 2015, and trial is set to begin on July 6, 2015. Dkt. 44.

DISCUSSION

A. DISCOVERY GENERALLY AND MOTION FOR PROTECTIVE ORDER STANDARD

Fed. R. Civ. P. 26 (b)(1) provides:

Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense--including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

"The court should and ordinarily does interpret 'relevant' very broadly to mean matter that is relevant to anything that is or may become an issue in the litigation." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351, n.12 (1978)(quoting 4 J. Moore, Federal Practice ¶ 26.56 [1], p. 26-131 n. 34 (2d ed. 1976)). "At the same time, discovery, like all matters of procedure, has

ultimate and necessary boundaries. Discovery of matter not ‘reasonably calculated to lead to the discovery of admissible evidence’ is not within the scope of Rule 26(b)(1).” *Id.*, at 351-352.

Pursuant to Rule 37(a)(1), “a party may move for an order compelling disclosure or discovery.”

Fed. R. Civ. P. 26(c) “Protective Orders” provides that the court “may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . .”

B. DEFENDANT’S MOTION FOR PROTECTIVE ORDER AND PLAINTIFFS’ MOTION TO COMPEL

1. Motions as They Relate to Attorney-Client Privilege and Work Product Doctrine

Defendant moves for the issuance of an order protecting it from having to produce documents which were generated after October 2, 2013 (the date Plaintiffs notified the Washington State Insurance Commissioner of their complaint against Defendant) and which were withheld as privileged because they are protected by the attorney-client privilege, work product materials, and created in anticipation of litigation. Dkt. 63. Defendant alternatively asserts that those documents generated after November 1, 2013 (the date Plaintiffs’ filed this case) and which it asserts are privileged should be protected. *Id.*

Plaintiffs did not directly respond to the motion for protective order, but, instead filed their Motion to Compel (Dkt. 67). In that motion, Plaintiffs seek an order compelling Defendant to produce documents in connection with:

Request for Production #7:

“Any correspondence or other documents exchanged between Defendant and any non-party regarding the Loss, Policy, Claims or Plaintiff.”

Request for Production #8:

All communications between Defendant and Enservio, or its agents, regarding the non-salvageable contents assessment of this Loss.

1 Dkt. 67. (It appears that Plaintiffs failed to properly number the Requests for Production in their
2 motion. The motion's "Request for Production #7" is the Request for Production #9 in
3 Plaintiffs' First Request for Production of Documents (Dkt. 68-1, at 5); the motion's "Request
4 for Production #8" is the Request for Production #10 in Plaintiffs' First Request for Production
5 of Documents (Dkt. 68-1, at 6)).

6 Defendants argue that they have turned over all documents responsive to these requests,
7 or included them in their Privilege Log or Supplemental Privilege Log. Dkt. 75.

8 Accordingly, Plaintiffs move for an order compelling Defendant to produce bates
9 stamped documents #21, #62, #82 and #83, which are listed in the Defendant's Privilege Log.
10 Dkt. 67. Plaintiffs also move for an order compelling Defendant to produce the documents
11 identified in pages 4-7 of Defendant's Supplemental Privilege Log. Dkt. 67. In both logs,
12 Defendant asserted "attorney –client privilege, anticipation of litigation and work product" as to
13 each of these documents. Dkt. 68-3, at 2-7.

14 As an initial matter, the parties' briefing raises the question of which law, federal or state,
15 applies to the assertion of attorney-client privilege and the work product doctrine. Under the rule
16 of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), federal courts sitting in diversity jurisdiction,
17 as is the case here, apply state substantive law and federal procedural law. *Gasperini v. Center*
18 *for Humanities, Inc.*, 518 U.S. 415, 427 (1996). Under Fed. R. Evid. 501, "state law governs
19 privilege regarding a claim or defense for which state law supplies the rule of decision."

20 Accordingly, Washington substantive law applies to claims of attorney-client privilege. Federal
21 law, however, governs assertions of work product protection. *See United Coal Cos. v. Powell*
22 *Constr. Co.*, 839 F.2d 958, 965–66 (3d Cir.1988); *Lexington Ins. Co. v. Swanson*, 240 F.R.D.
23 662, 666 (W.D. Wash. 2007).

1 In Washington, there is a presumption that there is no attorney-client privilege relevant
2 between the insured and the insurer in the claims adjusting process, and that the attorney-client
3 and work product privileges are generally not relevant.” *Cedell v. Farmers Ins. Co. of*
4 *Washington*, 176 Wash. 2d 686, 698 (2013)(*internal citations omitted*). An “insurer may
5 overcome the presumption of discoverability by showing its attorney was not engaged in the
6 quasi-fiduciary tasks of investigating and evaluating or processing the claim, but instead in
7 providing the insurer with counsel as to its own potential liability; for example, whether or not
8 coverage exists under the law.” *Id.*

9 Here, Defendant argues that the documents at issue were not produced in the course of
10 investigating or processing the claim, but go to liability. Under *Cedell*, then, “the insurance
11 company is entitled to an in camera review of the claims file, and to the redaction of
12 communications from counsel that reflected the mental impressions of the attorney to the
13 insurance company, unless those mental impressions are directly at issue in its quasi-fiduciary
14 responsibilities to its insured.” *Id.*

15 Defendant argues in later pleadings, however, that the Court should not look to the
16 attorney-client privilege, but should analyze whether these documents should be disclosed under
17 the work-product doctrine. Dkt. 75.

18 Under Fed. R. Civ. P. 26(b)(3), the work-product doctrine protects from “discovery
19 documents and tangible things that are prepared in anticipation of litigation or for trial by or for
20 another party or its representative.” *See also United States v. Richey*, 632 F.3d 559, 567 (9th Cir.
21 2011). “The work-product doctrine covers documents or the compilation of materials prepared
22 by agents of the attorney in preparation for litigation.” *Richey*, at 567 (*internal citation omitted*).
23 “To qualify for work-product protection, documents must: (1) be prepared in anticipation of
24

litigation or for trial and (2) be prepared by or for another party or by or for that other party's representative.” *Id.* (*internal quotations omitted*). Further, where a document was not prepared exclusively for litigation (it serves a dual purpose), “then the ‘because of’ test is used.” *Id.* “Dual purpose documents are deemed prepared because of litigation if ‘in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained because of the prospect of litigation.’” *Id.* “[C]ourts must consider the totality of the circumstances and determine whether the document was created because of anticipated litigation, and would not have been created in substantially similar form but for the prospect of litigation” in applying the “because of” standard. *Id.*, at 568 (*internal quotations omitted*).

Defendant’s motion for a protective order as to (Dkt. 63) should be denied without prejudice. The Court is unable to discern under the current record, whether any of the documents at issue are protected by the work product doctrine. None of the documents were filed in support of the motion, under seal (See Local Rule W. D. Wash. 5(g)), or otherwise. Moreover, Plaintiffs have pointed out that the Defendant’s Supplemental Privilege Log is not sufficiently clear as to all the entries. Descriptions such as “American Family Claims File Log after 10/02/12 – Date of IFCA Suit Notice” or “Document/image log note after 10/02/12 – Date of IFCA Suit Notice” are not enough to determine whether the doctrine applies. Defendant has not yet shown good cause for issuance of a protective order. Plaintiffs’ blanket motion to compel all of these documents (Dkt. 67) should also be denied without prejudice. Certain entries in the Defendant’s Supplemental Privilege Log, such as “American Family Claim File Log – entry re: meeting with legal,” are sufficient.

1 To the extent Plaintiffs move for an order compelling Defendant to provide a more
 2 detailed Privilege Log and Supplemental Privilege Log (Dkt. 67), that motion should be granted.
 3 Defendant should be ordered to provide a more detailed Privilege Log and Supplemental
 4 Privilege Log to Plaintiffs by April 3, 2005. Parties are strongly urged to resolve this dispute on
 5 their own without court intervention. Only absolutely necessary motions should be filed.

6 2. Motions as They Relate to the Advertising Materials and Enservio Generally

7 Plaintiffs move for an order compelling:

8 **Amended Request for Production #1:**

9 All marketing or advertising documents used by Defendant to solicit
 10 homeowners' insurance policy customers in the State of Washington through the
 11 period of 1-21-2012 (6 months prior to the effective date of the policy) through 7-
 21-2013 (the last day the policy was in effect).

12 Dkt. 67. Plaintiffs argue that these materials are relevant to Defendants' possible deviation from
 13 promised standards of conduct or claims settlement practices and as to what a reasonable person
 14 would believe they are entitled. Dkt. 67, at 5.

15 Plaintiffs also move for an order compelling:

16 **Amended Request for Production #5:**

17 All documents, including policies, contracts, procedures, instructions, and
 18 guidelines, given by Defendant to Enservio relating to non-salvageable contents
 assessments and valuations for Defendant that were in effect during the effective
 period of the policy (7-21-2012 through 7-21-2013).

19 Dkt. 67.

20 Plaintiffs' motion to compel documents responsive to Amended Request for Production
 21 #1 and Amended Request for Production #5 (Dkt. 67) should be granted and Defendant's motion
 22 for a protective order as to these requests (Dkt. 63) should be denied. Plaintiffs have shown that
 23
 24

1 these documents are relevant and Defendant has failed to show that good cause exists for the
2 issuance of a protective order.

3 **C. DEFENDANT'S MOTION TO COMPEL IRS RECORDS AND TAX RETURNS**
4 **AND MOTION TO STRIKE**

5 Defendant's motion to compel Plaintiffs to execute a stipulation and release to allow
6 Defendant to obtain Plaintiffs' IRS records and tax returns from 2011 to present from the IRS
7 (Dkt. 65) should be granted. Defendant has shown that, in light of Plaintiffs' claims that
8 foreclosure proceedings were initiated on the property (and that they damaged as a result despite
9 Plaintiffs testifying that they had enough money to pay off the mortgage arrears), Plaintiffs' have
10 placed their financial situation at issue and the records sought may well be relevant. Further,
11 Plaintiffs testified that all their copies of their tax related documentation burned in the fire. Dkt.
12 66-3, at 3. Defendant's motion to compel (Dkt. 65) should be granted.

13 In its Reply, Defendant also moves to strike paragraph three of R. Scott Taylor's
14 Declaration. Dkt. 80. Defendant's motion to strike (Dkt. 80) should be granted for the purposes
15 of this motion alone. The portion of the Declaration to which Defendant refers was of little or no
16 assistance to the Court in deciding the motion to compel, however.

17 **ORDER**

18 Therefore, it is hereby **ORDERED** that:

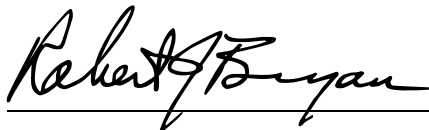
- 19 • Defendant's Motion for Protective Order (Dkt. 63) is **DENIED** as to Plaintiff's
20 Amended Request for Production #1 and Plaintiff's Amended Request for
21 Production #5; **DENIED WITHOUT PREJUDICE** as to Plaintiffs' requests for
22 documents for which Defendant has asserted work product doctrine protection,
- 23 • Plaintiffs' Motion to Compel Production of Documents from Defendant (Dkt. 67)
24 is **GRANTED** as to **Amended Request for Production #1** and Plaintiff's

1 Amended Request for Production #5; **DENIED WITHOUT PREJUDICE** as to
2 Plaintiffs' requests for production of documents for which Defendant has asserted
3 work product doctrine protection; and to the extent Plaintiffs move for an order
4 compelling Defendant to provide a more detailed Privilege Log and
5 Supplemental Privilege Log, that motion is **GRANTED**;

- 6 • Defendant shall provide a more detailed Privilege Log and Supplemental
7 Privilege Log to Plaintiffs on or before **April 3, 2015**.
- 8 • Defendant's Motion to Strike (Dkt. 80) is **GRANTED**, for the purposes of the
9 Defendant's Motion to Compel alone; and
- 10 • Defendant's Motion to Compel IRS Records and Tax Returns (Dkt. 65) is
11 **GRANTED**.

12 The Clerk is directed to send uncertified copies of this Order to all counsel of record and
13 to any party appearing pro se at said party's last known address.

14 Dated this 16th day of March, 2015.

15 
16

17 ROBERT J. BRYAN
18 United States District Judge
19
20
21
22
23
24